STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v

STEPHANIE WHITE **No. 150661**
Defendant-Appellant.

L.C. No. 12-37836-FH
COA No. 318654

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Table of Contents

Table of Authorities

Federal Cases

State Cases

Statutes

Other Sources

Counterstatement of the Question

I.

Under MCL § 750.81d an officer must have been performing his or her duties at the time of the defendant's conduct in resisting or obstructing. The officer here was performing his duties, and not engaged in a "frolic of his own." Did the defendant's resistance violate the statute; further, should *People v Moreno* be reconsidered and overruled ?

Defendant answers: NO

Amicus answers: YES

Statement of Facts

Amicus adopts the statement of facts by the People.

Argument

I.

Under MCL § 750.81d an officer must have been performing his or her duties at the time of the defendant's conduct in resisting or obstructing. The officer here was performing his duties, and not engaged in a "frolic of his own." The defendant's resistance violated the statute; further, *People v Moreno* should be reconsidered and overruled.

Introduction

A. The question the Court has directed be addressed, and the answer of the amicus

The question the Court has directed be addressed is "whether there was sufficient evidence presented at trial to support a determination that the arresting officer was lawfully in the defendant's house when she resisted or obstructed his attempts to arrest her son." Amicus answers that the evidence was sufficient; further, even if the officer was not lawfully in the house, defendant was nonetheless guilty, as *People v Moreno*[1] ought to be reconsidered and overruled.

B. Standard of Review: the "lawfulness" of the officer's conduct under *People v Moreno*—whether the officer was "performing his or her duties" at the time of the alleged resisting or obstructing—is either a burden-shifting affirmative defense, or an element of the offense, and so the question is one of sufficiency of the evidence

Defendant was convicted of resisting and obstructing a police officer. In *People v Moreno*[2] this Court overruled the Court of Appeals's decision in *People v Ventura*[3] to the extent

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[1] *People v Moreno,* 491 Mich 38 (2012).

[2] *People v Moreno,* 491 Mich 38, 41 (2012).

[3] *People v Ventura,* 262 Mich App 370 (2004).

that it held that the Legislature had chosen to modify the common-law rule—which was actually a statutory rule—that a person may resist an unlawful arrest. This Court explained the parameters of that right—"'one may use such reasonable force as is necessary to prevent an illegal attachment and to resist an illegal arrest' and that 'the basis for such preventative or resistive action is the illegality of an officer's action, to which [a] defendant immediately reacts.'"[4] This Court concluded that the right survived the 2002 amendment of MCL § 750.479 and enactment of MCL § 750.81d, which eliminated the requirement that the officer be performing "lawful acts" at the time of the resistence to support a conviction.[5]

Before *Ventura* and the enactment of MCL 750.81d, the Court of Appeals had considered the lawfulness of the arrest as an *element* that the People had to prove beyond a reasonable doubt.[6] This is inconsistent with the common-law foundation of the offense. In *People v Eisenberg*,[7] the court explained that "[t]he right to resist an unlawful arrest . . . is merely one aspect of self-defense. An unlawful arrest is nothing more than an assault and battery against which the person sought to be restrained may defend himself as he would against any other unlawful intrusion upon his person or liberty." The court's observations in *Eisenberg* are consistent with the common-law origins of the right. English courts recognized the common-law right in seventeen and eighteenth century decisions holding that the killing of a constable while

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[4] *Moreno, supra* at 47, quoting *People v Krum,* 374 Mich 356, 361 (1965).

[5] See 2002 PA 266.

[6] See e.g. *People v MacLeod,* 254 Mich App 222, 226 (2002); *People v Julkowski,* 124 Mich App 379, 383 (1983) (citing CJI 13:1:02).

[7] *People v Eisenberg,* 72 Mich App 106, 111 (1977).

resisting an illegal arrest reduced the crime from murder to manslaughter.[8] The United States Supreme Court similarly recognized the right in murder cases, holding in *Brown v United States*[9] and *Bad Elk v United States*[10] that the defendants were entitled to new trials because the trial courts failed to instruct their juries correctly regarding the right so as to permit a conviction of manslaughter, not murder. Those cases demonstrate that the lawfulness of the arrest was not an element of the offense, but rather, the alleged unlawfulness is a partial defense to the charge.

And so properly understood, the right to resist an unlawful arrest is a sort of burden-shifting affirmative defense, because it admits the doing of the act charged, but seeks to excuse it.[11] As an affirmative defense, defendant has the burden of production—he or she must introduce some evidence that his act was done under circumstances that excuse its commission.[12] If that burden is met, the People have the burden of proving beyond a reasonable doubt that those circumstances do not exist.[13] In the end, the situation is much like that with regard to the malice element for murder. Malice includes "negative" components, as the killing must be shown to be without justification or excuse. But it is not the case that the People must prove that the killing

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[8] See Kimberly T. Owens, Note, *Maryland's Common Law Right to Resist Unlawful Arrest; Does it Really Exist?*, 30 U. Balt. L. Rev. 213, 216-217 (2000).

[9] *Brown v United States,* 159 US 100, 102-103, 16 S Ct 90, 40 L Ed 90 (1895).

[10] *Bad Elk v United States,* 177 US 529, 537-538, 20 S Ct 729, 44 L Ed 874 (1900).

[11] See *People v Lemons,* 454 Mich 234, 245 n 15 (1997).

[12] *Id.* at 247 n 17.

[13] See *People v Reese*, 491 Mich 127, 155 (2012) (the People have the burden of proving beyond a reasonable doubt that a defendant did not act in self-defense); see generally *People v Dupree,* 486 Mich 693, 709-710 (2010); see also *In re Certified Question*, 425 Mich 457 (1986) (holding that sanity was not an element of the offense but a burden-shifting affirmative defense).

was not in self-defense in all cases, but only those where defendant introduces some evidence that raises the issue. So here. The People need not prove the lawfulness of the officer's conduct under *Moreno* unless there is some evidence raising the issue—and, amicus submits, "lawfulness" is the wrong inquiry, the proper inquiry being whether the officer was acting in the performance of his duty, which is not the same question. The question then is one of sufficiency of the evidence regarding whether at the time of the resisting and obstructing the officers were "performing their duties."

Discussion

A. *People v Moreno* Was Wrongly Decided

Moreno, amicus respectfully submits, was mistaken in several critical respects, and should be reconsidered and overruled:

- Assuming there remained a common-law right to resist an illegal arrest in addition to the *statutory* requirement in the pre-amendment MCL § 750.479 that the resisted officer's conduct be lawful, the Court's holding that the statutory changes did not abrogate the common-law rule was premised on a rule of statutory construction—that statutes abrogating the common law are to be strictly construed, so that any supposed abrogation must be made by the legislature "in no uncertain terms"—that is an inappropriate relic of a bygone era, a dice-loading rule which should be placed in the dustbin of jurisprudential history, and instead ordinary principles of determining the fair meaning of the words in the statutes should be employed.

- Stripping away the thumb on the scale—the dice-loading rule—that statutes abrogating the common law must be strictly construed, so that the legislature must speak in "no uncertain terms"—and instead seeking to ascertain the "objectified" intent of the legislature, the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*, leads to the conclusion that the former statutory requirement—or former common-law rule—that the officer

> obstructed must be engaged in a "lawful act" was removed by the legislature, so that it no longer obtains. If, however, an officer employs excessive force when carrying out his or her duties, a citizen has recourse to principles of self-defense.

1. *Moreno* is built on a rule of statutory construction that is a relic from a former time that should be abandoned, and that was inapplicable in any event

Moreno is a case of statutory construction. MCL § 750.81d, enacted in 2002, provides, in relevant part:

> (1) Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person[14] who the individual knows or has reason to know is performing his or her duties is guilty of a felony . . . .
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> * * *
>
> (7) As used in this section:

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[14] A person is defined in subparagraph (7)(b) as
(i) A police officer of this state or of a political subdivision of this state including, but not limited to, a motor carrier officer or capitol security officer of the department of state police.
(ii) A police officer of a junior college, college, or university who is authorized by the governing board of that junior college, college, or university to enforce state law and the rules and ordinances of that junior college, college, or university.
(iii) A conservation officer of the department of natural resources or the department of environmental quality.
(iv) A conservation officer of the United States department of the interior.
(v) A sheriff or deputy sheriff.
(vi) A constable.
(vii) A peace officer of a duly authorized police agency of the United States, including, but not limited to, an agent of the secret service or department of justice.
(viii) A firefighter.
(ix) Any emergency medical service personnel described in section 20950 of the public health code, 1978 PA 368, MCL 333.20950.
(x) An individual engaged in a search and rescue operation as that term is defined in section 50c.

> (a) "Obstruct" includes the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command.

And MCL § 750.479, which *had* provided that a person cannot "obstruct, resist, oppose, assault, beat or wound" named officers, including law enforcement officers, where those persons were engaged in "lawful acts,"[15] was amended in 2002 to limit the officers to which it applies,[16] and *remove* the requirement that the acts of those officers be "lawful."[17] At the same time, then, that MCL § 750.479 was amended[18] so that the phrase "*in their lawful acts*" was *excised*, MCL § 750.81d was enacted containing no such phrase in its use of language closely approximating that in the former version of MCL § 750.479 ("an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony").

The Court of Appeals in *People v Ventura*[19] found that the legislature, in enacting MCL § 750.81d and amending MCL § 750.479, had not acted pointlessly; rather, by so amending the statutory scheme, Michigan had joined the many jurisdictions that have chosen to require that the

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[15] This requirement of "lawful acts" dates back at least to C.L. 1871, § 7675.

[16] ". . . a medical examiner, township treasurer, judge, magistrate, probation officer, parole officer, prosecutor, city attorney, court employee, court officer, or other officer or duly authorized person serving or attempting to serve or execute any process, rule, or order made or issued by lawful authority . . . ." " MCL § 750.479(1)(a).

[17] ". . . or otherwise acting in the performance of his or her duties. . . ." MCL § 750.479(1)(b).

[18] The two were, in fact, "tie-barred" by the legislature in their passage.

[19] *People v Ventura*, 262 Mich App 370, 375-376 (2004).

forum for establishing whether an arrest is unlawful is not the street, by violence, but the *courtroom*, through litigation:

> Examining the language of the MCL 750.81d, unlike in MCL 750.479, we find no reference to the lawfulness of the arrest or detaining act. The language of MCL 750.81d is abundantly clear and states only that an individual who resists a person the individual knows or has reason to know is performing his duties is guilty of a felony. MCL 750.81d. Because the language of the statute is clear and unambiguous, further construction is neither necessary nor permitted, and we decline to " 'expand what the Legislature clearly intended to cover' " and "read in" a lawfulness requirement.[20]

As Judge Learned Hand once put it,"The idea that you may resist peaceful arrest . . . because you are in debate about whether it is lawful or not, instead of going to the authorities which can determine [the question] . . . [is] not a blow for liberty but on the contrary, a blow for attempted anarchy."[21] The Court of Appeals in *Ventura* was of the view that the legislature had opted out of allowing attempted anarchy.

But eight years later this Court disagreed, and overruled *Ventura*. This Court recognized that the matter was one of statutory interpretation, and the majority framed the question as whether "MCL §750.81d abrogates the common-law right to resist illegal police conduct,

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[20] Noting that MCL § 750.81d(7)(a) defines "obstruct" as including "the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command," the Sixth Circuit has observed that "a straightforward reading of the language of § 750.81d(7)(a) provides that the law can be violated in two ways: by physically resisting a command, whether lawful or unlawful, *or* by refusing to comply with a lawful command without using force." *Brooks v. Rothe,* 577 F.3d 701, 707 (CA 6, 2009).

[21] See *Wright v. Bailey*, 544 F.2d 737, 741 (CA 4, 1976), quoting Judge Hand as reported in the 1958 Proceedings, American Law Institute, at p. 254.

including unlawful arrests."[22] The Court's holding that the statute did not abrogate the common-law rule was premised on the principle of statutory construction that "statutes in derogation of the common law must be strictly construed," so that the legislature must have spoken in "no uncertain terms" in abrogating the common law.[23] But this foundation is one of sand, for the rule that statutes in derogation of the common law must be strictly construed is a relic of a former time, was never appropriate, and ought to be discarded; further, assuming that there was in Michigan a common-law right to resist an illegal arrest, that judicially-created right was *supplanted by legislation* as far back as 1871, for the statute *itself* required that the officers resisted or obstructed be in the performance of "lawful acts" at the time. In amending MCL § 750.479 and creating MCL § 750.81d the legislature was not abrogating a common-law rule, but modifying a *statutory* requirement.[24]

The rule of statutory construction that statutes in derogation of the common law are to be strictly construed is *inconsistent with Michigan statute*, and for that reason alone should be discarded. In MCL § 8.3a the legislature has specified how its statutes are to be construed: "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar

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[22] *People v. Moreno,* 491 Mich. at 41.

[23] *People v. Moreno,* 491 Mich. at 46.

[24] See Justice Markman's dissent: "in Michigan, pursuant to *Krum* and *Clements,* there was a *statutory* right to resist police officers in their unlawful acts." 491 Mich. at 64.

and appropriate meaning."[25] Nothing in the statute authorizes a thumb on the scale, or, as one commentator has put it, a loading of the dice—Chief Justice Corrigan has said that "The proper method of interpretation requires a judge to try to discern the fair meaning of the statutory text, free from dice-loading rules," for "dice-loading rules of construction as illegitimate. *These preferential rules include . . . the rule that statutes in derogation of the common law are narrowly construed*."[26]

Further, the origins of the rule, and its illegitimate purpose, have been understood for at least over a century.[27] As one commentator has observed:

> "When faced with the alien presence of statutory law, the strategy of judges trained in the common law was to control and subdue it by means of rules and principles like those they used to create, develop and integrate common law precedent." . . . The late nineteenth-century practice . . . paralleled the similar practices of English courts during the same time. Pollack, for example, commented that the canons of construction "cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds." Frederick Pollack, Essays in Jurisprudence and Ethics 85 (1882). *The classic example of this hostility to legislation*

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[25] Indeed, the legislature has also provided that "The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law." MCL § 750.2. This rule is applicable here.

[26] Corrigan and Thomas, "Dice Loading" Rules of Statutory Interpretation," 59 N.Y.U. Ann. Surv. Am. L. 231, 232 (2003) (emphasis supplied).

[27] See Roscoe Pound, "Common Law and Legislation," 21 Harv. L. Rev. 383, 387 (1908): "The proposition that statutes in derogation of the common law are to be construed strictly has no such justification. It assumes that legislation is something to be deprecated."

> *is the canon that statutes in derogation of the common law are to be strictly construed*.[28]

And on one occasion the United States Supreme Court itself questioned the origins and purpose of the rule:

> Some rules of statutory construction[29] come down to us from sources *that were hostile toward the legislative process itself* and thought it generally wise to restrict the operation of an act to its narrowest permissible compass. However well these rules may serve at times to aid in deciphering legislative intent, *they long have been subordinated to the doctrine* that courts will construe the details of an act in conformity with its dominating general purpose, *will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy*.[30]

Finally, the matter has been well summed up by Justice Scalia and Bryan Garner:

> It has often been said that statutes in derogation of the common law are to be strictly construed. *That is a relic of the courts' historical hostility to the emergence of statutory law*. The better view is that statutes will not be interpreted as changing the common law unless they *effect the change with clarity. There is no more reason to reject a fair reading that changes the common law than there is to reject a fair reading that repeals a prior statute*.... For both, the alteration of prior law must be clear—but it need not be express, nor should its clear implication be distorted.[31]

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[28] Landau, Jack, "Some Observations about Statutory Construction in Oregon," 32 Willamette L. Rev. 1, 68 (Winter 1996) (emphasis supplied)..

[29] This statement has been identified as an "apparent reference to the canons that statutes in derogation of the common law shall be strictly construed." Driesen, David, "Purposeless Construction," 48 Wake Forest L. Rev. 97, 108 (Spring 2013).

[30] *Securities and Exchange Commission v. C. M. Joiner Leasing Corp*., 320 U.S. 344, 350-351, 64 S.Ct. 120, 123, 88 L. Ed. 88 (1943) (emphasis supplied).

[31] Antonin Scalia and Bryan Garner, *Reading Law*, p. 318 (emphasis supplied).

In other words, as MCL § 8.3a provides, "All words and phrases shall be construed and understood according to the common and approved usage of the language."[32] So read, MCL § 750.81d does not continue the requirement that the officer be engaged in a "lawful act" when resisted or obstructed.

2. When the thumb is off the scale—or the dice unloaded—MCL § 750.81d contains no "lawful act" requirement

If MCL § 750.81d is parsed under MCL § 8.3a, and under ordinary principles of construction, absent application of rules that load the dice or place a thumb on the scale, as the Court did in *Moreno*, no "lawful act" requirement appears. A court, in construing a statute, does not "really look for subjective legislative intent. We look for a sort of 'objectified' intent, the intent that *a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris.* As Bishop's old treatise nicely put it, elaborating upon the usual formulation: '[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; *or, exactly, the meaning which the subject is authorized to understand the legislature intended.'*"[33] MCL § 750.81d provides that "an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony," and replaces statutory text formerly in MCL § 750.479 that it is an offense for one to "obstruct, resist, oppose, assault, beat or wound any . . . person or persons authorized by law to maintain and preserve the peace, *in*

[32] And again, involved here is the modification of a statute (and the creation of another in tandem with the modification), not the abrogation of a common-law rule.

[33] *Maier v. General Telephone Co. of Michigan*, 466 Mich. 879 (2002) (Corrigan, C.J., concurring in the denial of leave to appeal) (first emphasis supplied; second emphasis in the original).

their lawful acts, attempts and efforts to maintain, preserve and keep the peace." With the thumb off the scale, the dice unloaded, the question is the objectified legislative intent that a reasonable person would gather from the text of the statute, placed alongside the remainder of the *corpus juris*, not whether the statute "in no uncertain terms" abrogated a common-law rule, a rule which itself had been supplanted by statute long ago.

The *Moreno* majority held that it had not been shown that the legislature had "in no uncertain terms" abrogated the common law in enacting MCL § 750.81d and amending § MCL 750.479. The majority found the "omission of the phrase 'in their lawful acts' from MCL 750.81d," not to mention its *deletion* from MCL § 750.479, was inadequate to the task. The majority so found largely on the ground that "[b]oth statutes now include language that this Court has used in the past to explain that the common-law offense of obstructing or resisting an officer occurs while the protected person is 'performing his or her duties.' The term 'duty' generally means 'something that one is expected or required to do by moral or legal obligation' and legally implies 'an obligation one has by law or by contract.'" By using the phrase "performing his or her duties" the legislature had, the majority said, simply continued the requirement that "the offense of resisting and obstructing requires that an officer's actions are lawful."[34] Or, put another way, the legislature had not abrogated the common-law rule "in no uncertain terms."[35]

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[34] *People v. Moreno*, 491 Mich. at 55-56.

[35] "[N]owhere in MCL 750.81d does the Legislature state that the right to resist unlawful conduct by an officer no longer exists." *People v. Moreno,* 491 Mich. at 48. But see Justice Markman's dissent, noting that *even when* the rule that a statute allegedly abrogating the common law must be strictly construed is applied, "this Court has already held that the Legislature does not have to expressly state that it is 'abrogating a common-law right' in order for it to abrogate a common-law right." *People v. Moreno*, 491 Mich. at 66-67 (Markman, J., dissenting).

This critical mistaken conflation of "performing his or her duties" and "engaged in their lawful acts" was driven, at least in part, it appears, by a misunderstanding, amicus submits, of the consequences which might result from the Court of Appeals' holding in *Ventura*—though there is no evidence that such consequences had actually arisen in the 8 years after *Ventura*. The Court pointed to an exchange at oral argument:

> The meaning of this added phrase is not inconsistent with the omitted phrase "in their lawful acts." This concept was illustrated at oral argument when Justice Cavanagh questioned the prosecutor as follows:
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> *Justice Cavanagh*: Can I pose this hypothetical to you? What if you have a situation where you have a male officer performing his duties undertakes a search of a female prisoner and puts his hand inside her pants and commits a CSC [criminal sexual conduct]? Under your just stated interpretation of [MCL 750.]81d and under *Ventura*'s holding, and assuming she resists—she fights him off, tries to fight him off—she could be charged could she not?
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> *Prosecuting Attorney:* No.
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> *Justice Cavanagh:* Why?
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> *Prosecuting Attorney:* What—what duty is he performing?
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> *Justice Cavanagh:* Doing a search.
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> This exchange illustrates that there is no relevant distinction between the meaning of an officer "performing his or her duties" and an officer engaging in "lawful acts." Just as an officer acts outside his or her legal duty to perform a search by committing an assault, the officers in this case acted outside their legal duties by unlawfully entering defendant's home without a warrant.[36]

But what this exchange actually reveals is that the majority was of the view that if the statutory changes were read according to their terms—without adding a requirement that the officer

[36] *People v. Moreno,* 491 Mich. at 56.

obstructing or resisted be "engaged in his or her lawful acts," as the statute formerly required—resistence to unprivileged assaults, even sexual assaults, by officers would not be permitted. *This is simply wrong.*

That an officer must, under MCL § 750.81d, be "performing his or her duties" means that the officer must be engaged in the performance of his or her function as a peace officer. An officer who commits an armed robbery of a convenience store, even on duty, is not "acting in performance of his duties." But an officer may certainly act in the performance of his or her duties and have that action ultimately judged "unlawful." Arrests must be based on probable cause. Even appellate judges and courts on occasion disagree as to whether probable cause existed in a particular situation. If it is ultimately adjudged that the arrest was without probable cause, then the seizure was improper under the Fourth Amendment and thus unlawful; the officer's actions, however, are not retroactively converted to actions outside of his or her duties, nor are they even necessarily subject to censure.[37]

Several opinions well make the point. The 11th circuit in *United States v. Jennings*[38] has said in a related area that "A correctional officer may commit what is later determined to be an illegal act in handling a prisoner but still may be acting within the scope of his employment. . . . The test is not whether the officer is abiding by laws and regulations in effect at the time of the

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[37] Given the nature of their duties, virtually every mistake by a police office can be viewed as an "unlawful" act, but is not the case that every mistake by an officer is deserving of criticism. Some are understandable and reasonable. Indeed, in such cases, officers have immunity from suit: "Officers may also be entitled to qualified immunity if they arrest a suspect under the mistaken belief that they have probable cause to do so, provided that the mistake is objectively reasonable." *Amrine v. Brooks*, 522 F.3d 823, 832 (CA 8, 2008).

[38] *United States v. Jennings*, 991 F.2d 725, 732 (CA 11, 1993) (emphasis supplied).

incident, but whether the officer is on some '*frolic of his own.*'" Similarly, the Utah Supreme Court in *State v. Gardiner*[39] held that "[t]he fine question of legality must be determined in subsequent judicial proceedings, not in the street. In interpreting the language 'scope of authority,' we find illustrative the Second Circuit's decision in *United States v. Heliczer,* 373 F.2d 241, 245 (2d Cir.1967). There, it stated that the test is whether an officer is doing what he or she was employed to do or is 'engaging in a personal frolic of his [or her] own.'" And the Second Circuit itself in *United States v. Heliczer*[40] rejected defendant's claim that "if the arrest was unlawful, the agents were not engaged in performing their official duties, and Martin had a right to resist," as "'Engaged in * * * performance of official duties' is simply acting within the scope of what the agent is employed to do. The test is whether the agent is *acting within that compass or is engaging in a personal frolic of his own. It cannot be said that an agent who has made an arrest loses his official capacity if the arrest is subsequently adjudged to be unlawful*."

But this does not mean, as the *Moreno* majority seemed to think, that under *Ventura* citizens, if *assaulted* by police officers by the use of force unnecessary to accomplish the Fourth Amendment action, be it a stop or arrest, have no recourse. Principles of self-defense still applied under *Ventura.* Whether arrested on probable cause or in its absence, a citizen would not violate MCL § 750.81d in exercising the right of self-defense against an unprivileged assault of the kind hypothesized by Justice Cavanagh, or any other excessive use of force. All jurisdictions that have abolished the common-law rule allowing resistence to an illegal arrest apply principles of self-defense to use of excessive force in arrest. Put another way, while the *basis* of an arrest,

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[39] *State v. Gardiner,* 814 P.2d 568, 574 (Utah, 1991).

[40] *United States v. Heliczer*, 373 F.2d 241, 245 (CA 2, 1967) (emphasis supplied).

or other Fourth Amendment seizure, may not be contested on the street, the *manner* of its execution may be contested in the sense that a citizen is not required to simply permit him or herself to be beaten or sexually assaulted to avoid violation of MCL § 750.81d.

Again, the point is made clear in those many jurisdictions that do not allow resistence to an arrest on the ground that the arrest is illegal, that issue being one for the courts and not the street. Examples abound:

- Under our self-defense statute . . . the illegality of an arrest is not a defense to a charge of interfering with an officer pursuant to § 53a–167a. . . . a detailed instruction that the state must establish that the police officer had been acting in the performance of his duty and that a *person is not required to submit to the unlawful use of physical force during the course of an arrest, whether the arrest itself is legal or illegal*, stands in lieu of a self-defense instruction in such cases.[41]

- "it is crucial to distinguish between (1) the use of physical force in resisting arrest and (2) the use of physical force in defending oneself, *i.e.,* self-defense, against excessive use of force by the arresting officer. The former is unlawful. Depending on the circumstances, the latter may be justifiable and not criminal."

* * * * *

"If a peace officer uses excessive force in making an arrest, the arrestee has a right to use physical force in self-defense against the excessive force being used by the officer. *In that circumstance, the arrestee is not 'resisting arrest,' but, rather, is defending against the excessive force being used by the arresting officer.*"[42]

- A self-defense instruction *should only be given in a resisting arrest case when a defendant resists arrest after the officers resort to using excessive force*. A self-defense instruction is inappropriate in

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[41] *State v. Nelson*, 73 A.3d 811, 820 (Conn.App., 2013).

[42] *State v. Oliphant*, 218 P.3d 1281, 1291 (Or., 2009), quoting *State v. Wright,* 799 P.2d 642 (Or., 1990) (emphasis supplied).

> this case where defendant resisted arrest and then officers used force to effectuate the arrest.[43]
>
> - in the absence of excessive or unnecessary force by an arresting officer, a private citizen may not use force to resist arrest by one he knows, or has good reason to believe, is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances.[44]
>
> - a defendant is allowed to resist only excessive force used to effect an arrest.[45]

And there are many, many more examples.

Removing the dice-loading rule that the legislature, when abrogating the common law, must speak "in no uncertain terms," and looking to the "objectified" intent of the legislature, the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*—which is, essentially, to apply MCL 8.3a—leads to the conclusion that under the statute one may convicted of resisting and obstructing an officer under MCL § 750.81d even if the police conduct is later determined to have been mistaken, as without the appropriate cause, but one may exercise the right of self-defense if the *manner* of that official conduct is improper; that is, if excessive force is employed (which would include, of course, a sexual assault; see the Justice Cavanagh example). Whether *excessive* force was employed becomes a jury question under principles of self-defense, were that the claim of the defendant.

Moreno was wrongly decided, and *Ventura* was correct, and functioned appropriately for eight years. The legislature did not act purposelessly, and this Court should reconsider and

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[43] *People v. Haynes*, 946 N.E.2d 491, 498 (Ill.App. 1 Dist., 2011) (emphasis added).

[44] *City of Columbus v. Fraley*, 324 N.E.2d 735, 740 (Ohio, 1975).

[45] *State v. Mathre,* 683 N.W.2d 918, 922 (N.D., 2004).

overrule *Moreno*, which has stood only for three years. The Court can right that wrong, while at the same time ridding the jurisprudence of the "dice-loading rule" that the legislature, when abrogating the common law, must speak "in no uncertain terms," a rule also inconsistent MCL § 8.3a.

B. Taking the evidence in the light most favorable to the people, the officer here was acting in performance of his duties when defendant resisted and obstructed

1. The facts

Here, Officer Green, knowing that Stephen White had five warrants for arrest, and that he had previously had contact with defendant at 2855 Germain Drive, went looking for Stephen White at that address, dressed in uniform. One of the warrants gave that address as Stephen White's address. He walked up the back door of the residence, looked through the screen door, saw a white male working at the kitchen sink, and knocked. Stephen White and a young black male came to the door. Stephen White began to open the screen door, said "hold on," turned around, and walked towards the front of the home.[46] Officer Green told Stephen White to stop, and could not tell where he was heading. Officer Green entered, and asked the young male where Stephen White had gone, but that person did not respond. Officer Green walked from the kitchen into the dining room, when defendant appeared. Officer Green asked her where Stephen White had gone, and told her he had warrants for Stephen White's arrest. Defendant responded "I know, what's new." As Officer Green walked toward the front door, as he had last seen Stephen White going toward the front of the house, defendant yelled that Officer Green needed a

[46] The young black male, Armani White, Stephen White's brother, told the police that Stephen White had come to the door and said "hold up," and then walked out the front door at a fast pace. He admitted at trial that he told the police the truth.

search warrant. Defendant blocked Officer Green from walking toward the front door, and from going upstairs. Officer Green did not know where Stephen White was during this time; he could have been going to get a weapon.

Officer Green pushed through defendant's arm, told her to sit down, and that he was going upstairs to look for Stephen White. Defendant blocked him, and he told her to sit down or he would handcuff her for safety, as he did not know where Stephen White was or what he might be doing. Defendant demanded to see the arrest warrants and came toward officer Green, who told her to turn around and place her hands behind her back; she was angry, and he did not want her to assault him or obtain a weapon. Officer Green grabbed defendant's hand and she pulled away. The officer grabbed defendant, pinned her to the wall, and handcuffed her left hand. She resisted, but Officer Green was able to cuff her right hand. She then told Officer Green that Stephen White had gone out the front door.

. **2. Application of *Payton v New York*[47]**

Defendant says that the prosecution "presented insufficient evidence that Mr. Green [sic; Stephen White] also resided at that house [the residence Officer Green entered]."[48] He further says that the "limited authority to enter a private residence based on an arrest warrant extends *only* to the residence of the person named in the warrant,"[49] that "the record does not support a conclusion that Stephen White was living at 2855 Germain when Officer Green entered the

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[47] *Payton v. New York*, 445 U.S. 573, 100 S Ct 1371, 63 L.Ed.2d 639 (1980).

[48] Defendant's application at 9 (bracketed material added).

[49] Defendant's application at 10, emphasis in the original.

house to arrest him,"[50] and that Officer Green never said that he believed Stephen White lived at the house.[51] But defendant applies the wrong test.

It was not necessary for the prosecution prove that Stephen White actually resided at the house, nor that the officer believed Stephen White resided there. Rather, "*Payton* requires a two-part inquiry to determine if entry pursuant to an arrest warrant complies with the Fourth Amendment's proscription of unreasonable searches. . . . 'first, there must be a *reasonable belief that the location to be searched is the suspect's dwelling*, and second, the police must have 'reason to believe' that the suspect is within the dwelling.'. . . Elaborating on this inquiry, . . .'for law enforcement officials to enter a residence to execute an arrest warrant for a resident of the premises, the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality, *must warrant a reasonable belief* that the location to be searched is the suspect's dwelling, and that the suspect is within the residence at the time of entry.'"[52] It is *not* the case that the officer must believe subjectively that the defendant lives in the dwelling, the matter is instead an inquiry into whether the *objective facts*—the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality—*warrant*, as an objective matter, a reasonable belief that the location to be searched is the suspect's dwelling, and that the suspect is within the residence at the time of entry. And so the question becomes, what does a "reasonable belief" mean?

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[50] Defendant's application at 14.

[51] Defendant's "Judgment Appealed from and Relief Sought," at 3.

[52] *United States v. Bervaldi*, 226 F.3d 1256, 1263 (CA 11, 2000). See also *United States v Masgluta*, 44 F.3d 1530 (CA 11, 1995); *United States v Route*, 104 F.3d 59 (CA 5, 1997); *Carpenter v State*, 974 N.E.2d 569 (Ind.App., 2012);

The answer is that it means something more akin to reasonable suspicion than probable cause:

> it is generally accepted that the *Payton* "reason to believe" requirement, *a purely objective test*, involves something less than the traditional probable cause standard. . . . As stated in *Commonwealth v. Silva*, 440 Mass. 772, 802 N.E.2d 535 (2004), citing cases:
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> > Every Federal circuit court of the United States Court of Appeals that has addressed the issue, except the Ninth Circuit, has held that the 'reason to believe' language was meant to employ a standard less exacting than probable cause. The vast majority of State courts have followed suit.[53]

As well put by the District of Columbia Court of Appeals, "The Ninth Circuit alone has held that reason to believe 'embodies the same standard of reasonableness inherent in probable cause.' See *United States v. Gorman*, 314 F.3d 1105, 1110 (9th Cir.2002). We think it more likely, however, that the Supreme Court in *Payton* used a phrase other than 'probable cause' *because it meant something other than 'probable cause.*'"[54]

Instructive also is *Maryland v Buie*.[55] There the Supreme Court recognized an exception to the warrant requirement for a protective sweep accompanying an in-home arrest, permitting one sweep automatically, and another based on a showing of cause. When the police arrest an individual at his or her home, they may "without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be

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[53] 3 Lafave, *Search and Seizure* (5th Ed) § 6.1a.

[54] *United States v. Thomas*, 429 F.3d 282, 286, 368 (CA DC, 2005) (emphasis supplied).

[55] *Maryland v. Buie,* 494 U.S. 325, 327-328, 110 S.Ct. 1093, 1095, 108 L.Ed.2d 276 (1990).

immediately launched."[56] Further, the police may conduct a limited search of the premises beyond those places immediately adjoining the place of arrest without a warrant and without probable cause if there are "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene."[57] And what did the Court cite in support of this search based on a reasonable belief that the area harbors an individual posing a danger to those on the arrest scene? The Court said that "This is no more and no less than was required in *Terry* and *Long*, and as in those cases, we think this balance is the proper one."[58] *Terry*[59] and *Long*,[60] of course, are *reasonable suspicion cases*.

Reasonable suspicion is not an onerous standard, need not show a fair probability of criminal conduct, and need not rule out the possibility that the conduct is innocent:

> "Although the government bears the burden of proving the reasonableness of an officer's suspicion, reasonable suspicion is not, and is not meant to be, an onerous standard." . . . Reasonable suspicion requires "considerably less" than a preponderance of the evidence and "obviously less" than probable cause to effect an arrest. . . ."To satisfy the reasonable suspicion standard, an officer need not 'rule out the possibility of innocent conduct,' or even have evidence suggesting 'a fair probability' of criminal activity." . . . As long as an officer has "a particularized and objective basis for suspecting an individual may be involved in criminal activity,

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[56] *Maryland v. Buie*, 110 S.Ct. at 1098.

[57] *Maryland v. Buie*, 110 S.Ct. at 1098.

[58] *Maryland v. Buie*, 110 S.Ct. at 1098.

[59] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

[60] *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983)

> he may initiate an investigatory detention even if it is more likely than not that the individual is not involved in any illegality."[61]

Extrapolating here, the facts and circumstances within the knowledge of Officer Green, when viewed objectively, and in the totality, must have been sufficient to warrant a reasonable belief that the dwelling entered was that of Stephen White. Required is considerably less than a preponderance of the evidence, and innocent or other explanations for these facts and circumstances need not be negated. And because this is *not a matter for the court in its independent judgment* in the circumstances here—not a motion to suppress evidence—but a question for the *jury*, the question becomes whether a reasonable juror, *taking the evidence in the light most favorable to the People, drawing all fair inferences in favor of the People's case from that evidence*, *could* find beyond a reasonable doubt that a reasonable officer could, objectively, have had a reasonable belief, as defined above, that the dwelling was Stephen White's. Stephanie White had called "a couple times when Stephen was acting up and we talked," and Officer Green had been at the house at least one other time when Stephen White was there. Defendant had five outstanding warrants, one of which had the defendant's address as his home address, the address regarding which Officer Green had received calls from concerning Stephen White and where Officer Green had seen defendant at least once previously. And before Officer Green entered Stephen White came to the door, and so was present in the dwelling on this occasion. On these facts, a reasonable juror, taking the evidence in the light most favorable to the People, drawing all fair inferences in favor of the People's case from that evidence, could find beyond a reasonable doubt that a reasonable officer could, objectively, have had a reasonable

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[61] *United States v. Pettit*, __F.3d__, 2015 WL 2217115, 3 (CA 10, 2015) (internal citations omitted).

belief, as defined above, that the dwelling was Stephen White's. The evidence was thus sufficient.

C. Conclusion

The statute here contains no requirement that the officer be acting lawfully, but rather that the officer be acting in performance of his or her duties, meaning that the officer is not engaged in a "frolic of his or her own." This Court should overrule *Moreno*, and so hold. There is no question that Officer Green was acting in performance of his duties, and not engaged in a frolic of his own; further, on the facts here, if *Moreno* is applied the evidence was sufficient to allow a reasonable juror, taking the evidence in the light most favorable to the People, drawing all fair inferences in favor of the People's case from that evidence, to find beyond a reasonable doubt that a reasonable officer could, objectively, have had a reasonable belief, as defined above, that the dwelling was Stephen White's, and thus acted "lawfully."

Relief

Wherefore, amicus respectfully requests that leave be denied, or, if leave is granted, the Court consider whether *People v Moreno* was wrongly decided.

Respectfully submitted,

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